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Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*
Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*
Appellees.

On Appeal from the United States
District Court for the District of Columbia

Joint Motion to Affirm Summarily

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QUESTIONS PRESENTED

Prior to the effective date of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, minors had the right to contribute to the committees of political parties and to candidates for federal office, subject to the same limitations that also applied to persons that had attained their majority. Section 318 of BCRA completely prohibits donations to committees and to candidates by minors. In the view of these Appellees, all of whom are minors, the question presented is:

> Whether the three judge district court erred in its judgment that the absolute ban on donations by minors was unconstitutional?

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In the Supreme Court of the United States

No. 02-1676
FEDERAL ELECTION COMMISSION, *et al.Appellants*
vs.
SENATOR MITCH MCCONNELL, *et al., Appellees.*

On Appeal from the United States District Court for the District of Columbia

Joint Motion to Affirm Summarily

The minor Appellees, by their next friends, move this Court pursuant to Supreme Court Rule 18.6 for an Order summarily affirming the judgment of the three judge court of the United States District Court for the District of Columbia, which held that Section 318 of BCRA is unconstitutional.

As set forth within, the questions regarding the constitutionality of Section 318 of BCRA are so well-settled in the precedents of this Court that plenary review of the judgment striking Section 318 as unconstitutional is unwarranted.

STATEMENT OF THE CASE

1. Section 318 of the Act–

The Federal Election Campaign Act ("FECA") directly prohibits any person from making political contributions in the name of another. Title 2 U.S.C. § 441f (2002). That prohibition encompasses contributions made by a parent in

the name of their minor child. FECA also directly prohibits any person from exceeding the maximum permitted political contribution. 2 U.S.C. § 441a. That limitation prevents the parent or guardian of a minor child from exceeding limitations on contributions by the ruse of donating in the name of their minor child. Thus, prior to the enactment of BCRA, federal law already prohibited circumventing campaign limits by making gifts in the names of children.

There was no evidence to suggest the need for such a flat ban. In fulfillment of its statutory enforcement responsibilities, the Federal Election Commission ("FEC") has investigated only the barest handful of instances of parental donations in the names of minor children.[1] Moreover, Congress made no factual findings in BCRA regarding problems related to donations by minors to the committees of political parties or to candidates in BCRA. Section 318 was added to the Act while the proposal was pending in the House. No explanation for the provision was offered during debate there.[2] The only explanation offered for the ban came during the Senate debate on the Act.[3] There, Senator John McCain stated that the ban was needed

1. The Federal Election Commission admitted in discovery below that one percent or fewer of its investigatory "Matters Under Review" "involved covered political contributions by minors or by parents made in the name of the minor children."

2. The Appellants acknowledged below the absence of any explanation related to this provision in the House debates on BCRA.

3. *See* 148 Cong. Rec. S2145-46 (daily ed. March 20, 2002) (statement of Sen. McCain).

to address the problem of parental circumvention of donation limitations by giving contributions in the names of their minor children.[4]

Nonetheless, when it enacted BCRA, Congress included Section 318, which amends FECA by adding to it a new section 324, prohibiting anyone seventeen years of age or younger from making any contribution to a candidate, or a contribution or donation to a national or state political party committee:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution to a committee of a political party.

Title III, § 318, H.R. 2356, 107th Cong. (2002) (enacted); FEC Jurisdictional Statement at 71a. Judge Henderson, in her separate opinion below, described Section 318 as "fall[ing] into the category of 'who knows where it came from.'" *See* Op. of Henderson, J., at 326; Supplemental Appendix to Jurisdictional Statements at ___ ("Supp. App.").

2. The Decision Below–

The three-judge panel unanimously agreed that Section 318 violated the Constitution:

> Section 318 prohibits donations by minors to federal candidates, or to a committee of a political party. All three judges agree that this section is unconstitutional.

4. *See* 148 Cong. Rec. S2145-48 (daily ed. March 20, 2002) (statement of Sen. McCain).

> Each judge writes a separate concurrence setting forth his/her reasoning as to this section.

Per Curiam Op. at 11; Supp. App. ___. As indicated, all three judges wrote separately to explain their reasoning for that conclusion.

Judge Henderson concluded that whether analyzed under strict scrutiny or under "*Buckley* scrutiny," Section 318 was unconstitutional. In Judge Henderson's view, the Appellants' arguments for the constitutionality of Section 318 failed for two principal reasons:

> First, section 318 does not serve any governmental interest, much less a "sufficiently important" or "compelling" one.
>
> * * * *
>
> Second, even if section 318 served to prevent actual or apparent corruption of federal candidates in a material way not served by existing law, the provision could not be sustained because—far from being "closely drawn" or "narrowly tailored"—it is grossly overbroad.

Op. of Henderson, J. at 328, 331; Supp. App. ___-___. In addition, Judge Henderson found that the evidence proffered to justify Section 318 as a tool to prevent corruption "is remarkably thin." Op. of Henderson, J. at 329, Supp. App. ___.

Judge Kollar-Kotelly, like Judge Henderson, found it unnecessary to decide between strict scrutiny or "*Buckley* scrutiny." In Judge Kollar-Kotelly's view, "Defendants have

failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important government interest." Op. of Kollar-Kotelly at 611, Supp. App. ___. *See also id.*; Supp. App. ___ ("the evidence presented is insufficient to support government action that abridges constitutional freedoms").

Judge Leon, while concurring in the conclusion of Judges Henderson and Kollar-Kotelly that Section 318 was unconstitutional, wrote "only to explain why [he] believe[d] th[e] Court should evaluate this provision under the strict-scrutiny standard of review." Op. of Leon, J., at 106; Supp. App. ___.

3. Facts Relevant to the Challenge to Section 318

a. *Echols v. FEC*

Appellees Emily Echols, Daniel Solid, Hannah and Isaac McDow, Jessica Mitchell, and Zachary White are citizens of the United States. Echols, Solid and White reside in Georgia, the McDows reside in Alabama, and Mitchell resides in Florida. Each of them is aged seventeen years or younger. These Appellees are seriously interested in government, politics, and campaigning. Their interest is demonstrable, having, amongst them, participated in campaigns as volunteers, assembled signs, distributed literature, walked precincts, even traveling great distances to campaign door-to-door for candidates they support. In such ways and others, they have shown their commitment to using their rights to freedom of association and expression to effect political changes in accord with their beliefs and opinions.

These minors possess monies that they have earned – either by working outside their homes or by performing chores around their homes for pay – or that they received as gifts. No portion of these monies consists of funds given to them for the purpose of making political contributions. The parents of the Echols plaintiffs are aware of the federal campaign laws and the restrictions they impose; and they have obeyed those laws.

For these young citizens, contributing money to candidates and to the committees of political parties are forms of expression of support for those candidates and committees. Moreover, by making such contributions of money, they have already associated with those selected candidates and committees of political parties. The minors Appellees plan to, and intend to, exercise their rights of political association and expression by making candidate and committee contributions, during their minority, into the future. But for the enactment of Section 318 and its ban on such political contributions by them, they would be free to do so.

b. *McConnell v. FEC*

Appellee Barret Austin O'Brock is a minor living in Louisiana.[5] He declared his general intention to contribute

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5. In the court below, Trevor M. Southerland, then a minor, also challenged Section 318. On May 28, 2003, Mr. Southerland attained his majority. Consequently Section 318 no longer deprives him of the rights to freedom of speech and association that he complained of, and vindicated below. Although he has reached his majority, the claim in the *McConnell* litigation was brought by him and by Barret O'Brock, who is still in his minority, and by the plaintiff minors in the *Echols* litigation, all of whom are also still in their minority. Consequently, the apparent mootness of Mr. Southerland's claim does not render moot the judgment below that Section 318 is unconstitutional; nor does his majority warrant an Order vacating the injunction against enforcement of Section 318 as to those Appellees still in their minority.

to federal candidates in future elections, including in the 2002 and 2004 election. Specifically, he stated his intention to contribute at least $20 of his own money (not received from any other person for purposes of the contribution) to John Milkovich, a candidate for U.S. Representative for the Fourth Congressional District of Louisiana, prior to the November 2002 general election. Barret knows candidate Milkovich personally because the candidate was Barret's Sunday School teacher for two years.

SUMMARY OF ARGUMENT

The day is long past when America's teenagers and children may be consigned to constitutional steerage, there to "enjoy" all the benefits of third class citizenship. As early as *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), it has been without question that American children are "whole persons" in the constitutional sense. Concomitantly, they possess the same constitutional rights and liberties as adults, even if, in certain circumstances, such as the special case of public schools, the contours of those rights vary slightly from the rights of their adult counterparts. *See Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Nonetheless, in a stunning strike against those rights, Congress enacted the complete ban embodied in Section 318. All three of the judges below agreed that Section 318 was unconstitutional. A majority – Judges Henderson and Kollar-Kotelly – agreed that it was unnecessary to decide whether a more or less stringent standard of review applied because of the flagrant unconstitutionality of the flat ban. Judge Leon did not disagree with that view, but instead focused on the reasons for applying strict scrutiny to Section 318.

The flat ban on donations by minors to political party committees and to candidates flouts several constitutional norms relevant to laws affecting associational freedoms and expression. In accord with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976), the ban on all political contributions by minors is subject to the closest scrutiny.[6] But even if the ban is subjected to the lesser scrutiny applied to donation limitations in *Buckley*, the court below correctly concluded that it could not withstand such scrutiny.

The ban is severely flawed. It is not drawn in service of a sufficiently important government interest. Even assuming a sufficiently compelling justification for Congress to act, the ban on political contributions by minors is not drawn

6. As explained in *Buckley*, 424 U.S. at 16-18, Section 318 must be subjected to something more than the scrutiny embodied in *United States v. O'Brien*, or the time, place and manner analysis employed in the Public Forum cases, *e.g.*, *United States v. Grace*, 461 U.S. 171 (1983).

narrowly in service of the government interests at stake.

ARGUMENT

I. SECTION 318 VIOLATES MINORS' CONSTITUTIONAL RIGHTS

As a matter of first principles, a complete ban on political contributions strikes directly at the heart of the First Amendment. As this Court explained, in addressing statutory ceilings on the amount of personal contributions: "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Nothing in *Buckley* or its progeny suggests that the injury of such a flat prohibition on even token contributions is felt any less keenly by, or inflicts less grievously a wound upon the rights of, citizens of the United States who are in their minority.

A. MINORS POSSESS FIRST AMENDMENT RIGHTS OF FREEDOM OF ASSOCIATION AND SPEECH.[7]

If, as this Court has said, student do not "shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969), then there can be no question that they possess those rights before they pass

7. This case does not address the lawful authority of parent or guardians over minors in their care and under their control, but rather, it addresses the imposition by Congress of a complete ban on the exercise by minors of rights of speech and association.

through those gates. Here, as with analogous contributions by their adult counterparts, the political contributions of minors are, at a minimum, an exercise of the constitutional right to political association. *Buckley*, 424 U.S. at 15 ("The First Amendment protects political association as well as political expression;" "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas") (citations and internal quotation marks omitted). For these minors, contributions to candidates and committees of political parties serve to express support for and association with selected candidates and committees.[8]

In *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), the Court noted that government intrusion into a minor's fundamental

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8. Of course, special circumstances exist in which the exact dimensions of the constitutional rights enjoyed by minors vary from those of their adult counterparts. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975). Most of the cases discussing the questions related to minors' First Amendment rights, for example, arise in the special environment of the school. But even there, this Court has stated that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect[.]" *Tinker*, 393 U.S. at 511. Other special circumstances include, for example, restricting minors' access to obscene materials, *see, e.g., Ginsberg v. New York*, 390 U.S. 629, 637-38 (1968); restricting minors' access to abortion, *see, e.g., Bellotti v. Baird*, 443 U.S. 622, 634 (1979). *Cf. Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (upholding City's adoption of special use classifications for dance halls to prevent juvenile crime and victimization) (classification subject to rational basis scrutiny because no fundamental right impinged or suspect category created).

rights may be justified based on "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." None of those special circumstances, however, is implicated by this statutory restriction on core First Amendment rights.

The Government makes the novel argument, see Jurisdictional Statement at 28, FEC v. McConnell (docketed May 15, 2003), that "any First Amendment interests that minors may have in participating in the financing of federal elections is substantially limited by the fact that minors have no constitutional right to vote in such elections." Unsurprisingly, the Government does not rely on any decision of this Court (or, for that matter, of any other court) for this proposition. It is insupportable and without merit. While it is true that minors do not possess the right to vote, it is just as true that they pay taxes and possess the right to freedom of speech and of association. No limiting principle is enunciated in the Government's standard to prevent the suppression of rights of expression in a variety of circumstances.

In the absence of such a limiting principle, the most unacceptable and unconscionable results follow in any case where a government program or action affects selected groups or individuals, but leaves unaffected others who may, nonetheless, hold views or opinions that they would express about the Government's action. Women, for example, are not required to register for selective service. In this sense, women are not affected by the registration requirement.

According to the Government's approach, the federal government could suppress the speech and associational rights of a group of mothers of draft-eligible young men. Other examples clamor for attention. Men, using the Government's rationale, could be silenced in either their support for or opposition to abortion rights, because, after all, men cannot become pregnant. All persons in the United States who are not the descendants of African Americans once held in involuntary servitude could be silenced on the question of whether a government program of reparations should be undertaken.

The Government's rationale fails to account for the terms of the First Amendment, which do not admit of an entire exception from protection for minors. Nor does the Government seek to square its approach with the decisions of this Court that have recognized that minors are persons in the constitutional sense and possess rights under the First Amendment. The Government casually ignores the certainty that even if minors are not protected from discrimination on the basis of age in voting, every federal election in this Nation is a matter of significance to them and to their future. The examples cited above, and the multitude more that can readily be drawn from a topical index of cases decided by this Court or the Popular Names Table of United States Statutes, adequately dispose of the simplistic "they can't vote so they don't count" approach taken by the Government.

B. There Is No Sufficiently Compelling Governmental Interest to Justify the Denial of Minors' Constitutional Rights of Speech and Association.

To discern whether Congress has gone too far in banning political contributions by minors, it is essential to ask what Congress sought to accomplish. Apparently, Congress sought to address parental circumvention of donation limitations and channeling of gifts. In the court below, the Appellants offered various justifications in defense of Section 318, including avoiding corruption and the appearance of it, assuring the legitimacy of the electoral system, preventing circumvention of campaign contribution limits, facilitating deterrence and detection of violations of federal campaign limitations, and restoring public faith in the system.

The concern about circumvention of donation limitations by wealthy parents using the names of their minor children – to which Senator McCain adverted on the Senate floor[9] – is unsupported by any substantial evidence. Both Judge Henderson and Judge Kollar-Kotelly took note of the "thinness" of the evidence supporting the need for Section 318. Judge Henderson found "the government's evidence of corruption-by-conduit . . . remarkably thin . . . ." Op. of Henderson, J., at 329; Supp. App. ___. Judge Kollar-Kotelly noted, the Government "failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important governmental

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9. *See* nn. 3-4 , *supra* and accompanying text.

interest . . . ." Op. of Kollar-Kotelly, J., at 611; Supp. App. ___. In light of that failure, Judge Kollar-Kotelly concluded, "the minimal evidence presented does not establish that circumvention of campaign finance laws by parents of minors supports the required governmental interest." Op. of Kollar-Kotelly, J., at 612; Supp. App. ___.

Even assuming that a statutory regimen may have been necessary to remediate the unsubstantiated problems of parental circumvention and excess giving, Section 318 is unjustifiable. A statutory ban on political contributions by minors burdens substantially more political association and speech than necessary precisely because its proscriptions apply to individuals who never have engaged in prior unlawful behavior.

The minors' donations to committees and candidates embody classic exercises of the right to freedom of political association and freedom of speech. No *valid* government interest supports this ban. Such a complete ban was not at issue in *Buckley*. Instead, because FECA permitted a contribution in some amount, this Court concluded that the ceiling on such contributions survived scrutiny. Here, Congress utterly prohibits even a token donation. That complete prohibition, to the contrary of the FECA *limitations* at stake in *Buckley*, encompasses so much speech and association unrelated to any regulable evil that it is "substantially broader than necessary to achieve the interests justifying it." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989).

Nor can concerns about abuses by a few parents, who

might circumvent restrictions on their own donations by using their minor children as surrogates, justify a flat ban on contributions by minors. Such circumvention is already illegal under FECA provisions predating BCRA and not challenged in this litigation. *See* Title 2 U.S.C. §§ 441a and 441f (2002). Moreover, the gift of money by a minor need not come *from* parental sources or *at* parental direction. For example, Jessica Mitchell, one of the minor Appellees in this case, donated money to a candidate for the United States House of Representatives that she had earned from a small pet care business that she and a friend started in their neighborhood. Each of the other minors, likewise, has monies that were not received as part of a scheme or plan of their parents to circumvent FECA's limitations on contribution amounts. Yet donations by the minor Appellees are barred by Section 318.

Oddly absent from the justifications proffered by the Appellants below is any assertion that money from minors is, in its essence, corrupting or evil. In fact, the proffered justifications exclusively focus on the alleged abuses of parents, which abuses already are directly prohibited by FECA. Moreover, the Government's interest in preventing corruption or the appearance of corruption is no greater (and arguably much less) with respect to minors than with respect to adults. If any contribution is corrupting, then all contributions should be banned: contributions of all sizes, contributions from all sources.

Plainly, the government interest in preventing parents from circumventing contribution limits by channeling additional contributions through their children is not

sufficiently compelling to justify Section 318.

C. Section 318 Is Not Narrowly Tailored to the Asserted Governmental Interest.

Two aspects on the statute are significant to an appropriate constitutional analysis of the fit between the asserted government purposes of the ban and the means chosen to serve them. First, the ban applies to individual minors whether or not their exercise of associational expression and free speech have threatened the interests identified by the Appellants. These minors are barred from symbolically expressing their association with candidates and committees by even token donations despite the utter lack of evidence that these minors have subverted campaign finance limitations, or that their parents or guardian have used them for that purpose. The ban applies to all gifts by minors even though there is no reason to conclude that such gifts, taken individually or in the aggregate, either by their nature or practice, works injury to the identified government interests.

Second, unlike the direct bans on giving contributions in the name of another, 2 U.S.C. § 441f (2002), and on exceeding limitations on contribution amounts, 2 U.S.C. § 441a(a)(1)(A), the ban on contributions by minors works a *prophylactic* suppression of constitutionally protected rights of minors. As this Court has repeatedly admonished, however, "broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 458 (1963).

In *Buckley*, of course, this Court upheld personal

contributions *ceilings*, not a complete ban. A *ban* on such gifts could not, however, pass muster. In fact, one of the signal justifications offered in *Buckley* for a contribution ceiling was that a ceiling left donors free to make some donation:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution . . . .

424 U.S. at 21. A *ban* that entirely prevents a minor from giving "to a candidate or campaign," does not "permit[] the symbolic expression of support evidenced by a contribution."

What is called for in this analysis is an examination of the fit between purpose and means. For example, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court upheld an ordinance that prohibited the posting of signs on public property, but only after concluding that the ordinance "responds precisely to the substantive problem [of visual blight] that concerns the City." That cannot be said of the contribution ban; it closely resembles the anti-littering law struck down in *Schneider v. State*, 308 U.S. 147 (1939). There, as here, the state "could have addressed the substantive evil without prohibiting expressive activity," or adopting a "prophylactic rule." *Taxpayers for Vincent*, 466 U.S. at 810. Similarly, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), also assume a fit

between means and ends that is lacking here. Thus, in *Ward*, an ordinance requiring that city employees operate sound amplification equipment was upheld because it directly advanced the city's interest in controlling noise. 491 U.S. at 800. Likewise, in *Clark*, a regulation barring protesters from sleeping in a park was upheld because it "narrowly focused on the Government's substantial interest in maintaining the parks in the heart of our Capitol in an attractive and intact condition." 468 U.S. at 296.

These cases all show that Congress must craft its statutes narrowly when regulating constitutional rights, and must limit its interests to those unrelated to the suppression of expression. *Buckley*, 424 U.S. at 17-18. Below, the Appellants identified the interests supposedly served by the statute. Unfortunately, the ban is not closely drawn to promote those interests. Instead, it focuses directly on expressive activities. It thus burdens substantially more speech than necessary to accomplish the state's goal and cannot be sustained.

The interests identified by the Appellants go to abuses by persons other than minors. But the ban targets constitutional exercises by minors. Consequently the ban does not target the "evil" – namely, circumvention or corruption – that motivated Congress to enact it. *Cf. Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil"). Of course, Congress can address circumvention and corruption problems directly; indeed, it already has done so with its enactment of 2 U.S.C. §§ 441a and 441f (2002).

Neither the minor Appellees nor their parents have challenged those existing provisions of FECA. Those unchallenged and existing restrictions directly serve the interests that are, at best, only obliquely served by Section 318's ban on political contributions by minors. Instead, the minors' ban goes further and in a different direction entirely. Section 318 prohibits minors' political contributions, even when such contributions are not made in circumvention of FECA's contribution limits. It prohibits contributions of emancipated minors. It prohibits contributions by orphaned minors. And it prohibits contributions of those minors who, with consent of their parents, have enlisted in the United States Armed Forces.[10]

These minors "are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *FEC v. National Conservative PAC*, 470 U.S. 480, 501 (1985). The First Amendment freedoms put in jeopardy by Section 318 are supremely precious. This Court has explained, "because First Amendment freedoms need 'breathing space' to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). While this Court has instructed that "[p]recision of regulation must be the touchstone" when regulating activities protected by the First Amendment, Section 318 apes that precision and instead broadly bans the exercise of pristine constitutional freedoms.

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10. *See* Title 10 U.S.C. § 505 (2002) (authorizing enlistment of minors).

Ready and less burdensome alternatives exist to ensure that current election laws are not manipulated by means of the channeling of funds through minors. In fact, the Federal Election Commission never recommended such a ban to Congress, preferring instead to suggest less drastic means.[11]

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11. The FEC has proposed to Congress that it adopt legislation related to contributions by minors to federal candidates and committees of political parties. The FEC has submitted Annual Reports to Congress and to the President as required by law. Those Reports provide information about the regulatory and enforcement activities of the Commission, and they also communicate proposals for legislative action.

In its 1992 Annual Report, the FEC recommended that Congress establish a minimum, but unspecified, age for contributors. *See* 1992 Annual Report at 64. In support of that recommendation, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another." *Id.*

In each of its Annual Reports for the years 1993-98, the FEC recommended that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf. *See, e.g.*, 1993 Annual Report at 50. The FEC explained, "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another." *Id.*

In its 1999 and 2000 Annual Reports, the FEC recommended that Congress establish a minimum age of 16 for making contributions.

Going beyond the all-or-nothing approach of the ban, Congress could have established a family contribution cap or employed a rebuttable presumption regarding the voluntariness of minors' contributions.[12] In fact, Congress

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See 1999 Annual Report at 50; 2000 Annual Report at 43. Regarding this proposal, the FEC stated: "The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another." *Id.*

12. The States have undertaken such less burdensome regimens of regulation, by which minors are permitted to continue making donations while the putative harms of circumvention and corruption are avoided by less draconian means. At least fourteen States have enacted less cumbersome and prohibitive regimes for the regulation of political donations by minors to candidates for state election:

Alaska : A minor may not contribute money or anything of value given to the child by a parent for that purpose. *See* 2 Alaska Admin. Code 50.258 (2002).

Arizona: A contribution from an unemancipated minor is treated as a contribution from his parents. *See* A.R.S. § 16-905 (2001).

Arkansas: When a person provides his/her dependent child with funds to make a contribution to a candidate, the contribution shall be attributed to such person for purposes of applying the contribution limit. *See* A.C.A. § 7-6-205 (2002).

Connecticut: No individual who is less than 16 years of age shall make a contribution or contributions, in excess of thirty dollars. *See* Conn. Gen. Stat. § 9-333m (2001).

Florida: No unemancipated child under the age of 18 years may

make a contribution to any candidate or political committee in excess of $100. *See* Fla. Stat. § 106.08 (2002).

Hawaii: A contribution by a dependent minor is reported in the name of the minor but counts against the contribution of the minor's parent or guardian. *See* HRS § 11-204 (2002).

Kansas: Contributions made by unemancipated children under 18 years of age are considered contributions made by the parent or parents of such children. *See* K.S.A. § 25-4153 (2001).

Kentucky: Minors' contributions may not exceed $100. *See* KRS § 121.150.

Massachusetts: Persons under age 18 may not contribute more than $25 per calendar year, in the aggregate. *See* Mass. Ann. Laws ch. 55, § 7 (2002).

Michigan: A contribution of expenditure by a dependent minor shall be reported in the name of the minor but shall be counted against the contribution limitations of the minor's parent or guardian. *See* MCLS § 169.253 (2002).

Oklahoma: For the purposes of limitations on contributions, those made by husband, wife and all unemancipated children under the age of 18 are aggregated to a single family unit. *See* 21 Okl. St. § 187.1 (2002).

South Carolina: Contributions by unemancipated children under 18 years of age are considered contributions by their parents. *See* S.C. Code Ann. § 8-13-1330 (2001).

Texas: A contribution by a child under the age of 18 of an individual is considered to be a contribution by the individual. *See* Tex. Elec. Code § 253.158 (2002).

West Virginia: Minors under the age of 18 may make a contribution if (a) the decision to contribute is made knowingly and voluntarily by the minor child; (b) the funds, goods or services are owned and controlled exclusively by the minor child; (c) the contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or not in any other way controlled by another individual. *See* W. Va. Code § 3-8-12 (2002).

could simply require the FEC and the Attorney General to enforce the current restrictions.

II. THE BAN ON CONTRIBUTIONS BY MINORS IS OVERBROAD.

Judge Henderson correctly concluded that Section 318 is unconstitutionally overbroad." Op. of Henderson, J., at 331-33; Supp. App. ___. Section 318 prohibits every contribution of money by a minor to a federal candidate or a committee of a political party. The prohibition applies to servicemen and women who are defending our Nation, 10 U.S.C. § 505 (2002), to emancipated minors, and to minors – such as these Appellees – who possess independence of judgment and separate financial means to make such donations. The ban is not limited to parents or guardians with a history of bad conduct; it assumes that no minor is to be trusted not to abuse his or her rights.

This is a case, not of mere "substantial overbreadth" but of *inherent* overbreadth: "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847, 865-66 (1984). *See id.* at 864-65 (in case of *inherent* overbreadth, the more demanding "substantial

overbreadth" test does not apply). This ban "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of [constitutional] freedom[s]." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Such an "overbroad" law "directly restricts protected expressive activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Munson*, 467 U.S. at 965 n.13. The ban flies in the face of established doctrine:"Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

III. SECTION 318 VIOLATES THE MINORS' RIGHTS TO EQUAL PROTECTION.

Because Section 318 is a complete prohibition, not merely a limitation on the amount of a permissible contribution, it is subject to strict scrutiny, *see Buckley*, 424 U.S. at 24-25. In addition to the associational freedom and free speech claims that they have presented, Section 318 also violates these Appellees' rights to equal protection guaranteed to them by the Fifth Amendment Due Process Clause. They have been selectively subjected to the burdensome provisions of the ban solely because of the age. Put another way, their exercise of fundamental First Amendment rights is differentially burdened, in an unjustifiable manner, because of their age. Consequently, for this separate reason, Section

318 is subject to strict scrutiny, which it cannot survive.[13]

CONCLUSION

For all the foregoing reasons, the judgment of the District Court below, holding that Section 318 of the Bipartisan Campaign Reform Act is unconstitutional, should be affirmed summarily by this Court.

Respectfully submitted,

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13.Because, in most respects, the analysis here would track the analysis applied in Argument I(B) and (C), it is unnecessary to duplicate those arguments here.